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No. 04-1210

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

GREGORY WADE HEMBREE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

This case is pending on the Petitioner's Petition for Rehearing of the Court's order summarily granting a writ of certiorari, vacating, and remanding for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005). The Petitioner submits this supplemental brief pursuant to Rule 15.8 to address three decisions that have been handed down since the petition for rehearing was filed: (1) the Eleventh Circuit's decision in *United States v. Levy*, Case No. 01-17133 (11th Cir. July 12, 2005),[1] which is reprinted in the appendix hereto, (2) the Eleventh Circuit's decision in *United States v. Vanorden*, Case No. 02-14049 (11th Cir. June 30, 2005), which is also reprinted in the appendix, and (3) this Court's decision on June 20, 2005, to deny a petition for writ of certiorari in *Rodriguez v. United States*, Case No. 04-1148. The purpose of this brief is to demonstrate (1) that the Court's remedy in this case will not have its intended effect, (2) that the Court should order the court of appeals to apply the holding in *Booker* to Petitioner's case, and (3) that the question presented in this case is not limited to *Booker* and does not require any further clarification of *Booker*.

I. The Eleventh Circuit Will Not Give Meaningful Effect to this Court's Remand Order.

In his pending Petition for Rehearing, the Petitioner expressed his understanding that the Court intended for the Eleventh Circuit to apply this Court's decision in

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[1] This brief refers to the court of appeals' July 12, 2005, decision as "*Levy*." Other opinions in that case are referred to by their complete citation.

Booker to determine whether the Petitioner could demonstrate plain error in his sentence, but asked this Court to reconsider its summary remand order because he "is concerned that the Eleventh Circuit will not share this interpretation of the Court's order." (Petition for Rehearing at 1-2.) The Eleventh Circuit's subsequent decisions in *Levy* and *Vanorden* confirm the Petitioner's concerns.

Levy involves the same issue raised in the question presented by the Petitioner here – whether a court of appeals may refuse to apply an otherwise retroactive decision of this court in a case that was pending on direct appeal at the time of this Court's decision where the appellant did not have the foresight to raise the issue in an initial brief filed before that decision. Both *Levy* and this case address this question in the context of *Booker*.

As was this case, *Levy* was pending on direct appeal when this Court issued its opinion in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), the direct antecedent to *Booker*. (App., *infra*, 2a.) Like the Petitioner in this case, the defendant in *Levy* did not raise a constitutional challenge to the Federal Sentencing Guidelines in his initial brief to the court of appeals. (App., *infra*, 2a-3a.) Indeed, binding Eleventh Circuit precedent clearly foreclosed any such argument. *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001). As did the Petitioner, the *Levy* defendant sought to raise the issue for the first time after *Blakely* was decided and after he had filed his initial brief, but while his case was still pending on direct appeal.[2] (App., *infra*, 2a.)

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[2] The defendant in *Levy* sought to raise *Blakely* in a petition for rehearing after his sentence was affirmed (App., *infra*, 2a), while the

(Continued on following page)

The court of appeals refused to entertain the *Blakely* argument because it had not been raised in the initial brief. *United States v. Levy*, 379 F.3d 1241, 1242-45 (11th Cir. 2004). The court subsequently denied rehearing en banc. *United States v. Levy*, 391 F.3d 1327 (2004). The court's reasoning and result in that case were the same as in the case below; indeed, the court of appeals cited this earlier opinion in refusing to allow the Petitioner to raise a *Blakely/Booker* argument in this case. (Petition for Writ of Certiorari Appendix at 44a.)

The *Levy* defendant then filed a petition for a writ of certiorari raising the same issue raised by Petitioner. Case No. 04-8942. On June 6, 2005, this Court granted the petition, vacated the court of appeals' decision, and remanded for further consideration in light of *Booker*. (App., *infra*, 3a.) The relevant language of this order was identical to the decision in this case.

On July 12, 2005, the court of appeals issued an opinion explaining that it has "now considered Levy's case in light of *Booker*," but affirmed for the same reasons as before and re-instated its prior opinion. (App., *infra*, 2a, 14a.) The last section of its opinion makes clear that the court of appeals was announcing how it would treat all *Booker* remands, such as the remand in this case. (App., *infra*, 12a-13a.) That section is titled "The Affect [sic] of Supreme Court Remands on the Application of This Court's Prudential Rules" and begins as follows:

> Since *Booker*, the Supreme Court has remanded over a hundred of our Circuit's cases with this

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Petitioner in this case sought leave to raise it in a supplemental brief prior to a decision.

> standard order or something similar: "The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of [*Booker*]." . . . Obviously, some of these remands, including *Levy*, involved cases in which this Court applied its prudential rules and refused to consider defendant's [sic] belated efforts to raise *Blakely/Booker* claims.

(App., *infra*, 12a.)

The court of appeals then explained its view that these remand orders require no more than that where the claim was not raised in the initial brief, the court of appeals must state that it has looked at the case and decided again to apply its "prudential rule" to refuse to consider the merits of the *Booker* claim. The court of appeals will, as a matter of course, simply reinstate its prior opinion and affirm the sentence without applying the holding in *Booker*. (App., *infra*, 13a.) The court of appeals noted that this Court's summary remand orders do "not necessarily impinge on [the court of appeals'] application of its prudential rules" and, instead, are merely "boilerplate orders [that] come out in bushel baskets full." (App., *infra*, 13a (quoting *United States v. Ardley*, 273 F.3d 991, 994 (11th Cir. 2001) (Carnes, J., concurring in the denial of rehearing en banc)).)

Vanorden followed essentially the same fact pattern, and the court of appeals again re-instated its prior opinion without applying the holding of *Booker*. (App., *infra*, 17a-18a.) Judge Tjoflat authored an opinion concurring in the result because he believed that this result was required under the Eleventh Circuit's decision in *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), which is discussed

in the petition for rehearing. (App., *infra*, 18a.) Judge Tjoflat described the *Dockery* rule as "a strange rule" and a "very bad rule." (App., *infra*, 18a.) He concluded:

> The upshot of our rule . . . is that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review will not apply at all to cases on direct review like this one [where the issue was not raised in the appellant's initial brief].

(App., *infra*, 27a-28a (citations omitted).)

Thus, the "writing is on the wall." This Court's remand order will not grant any meaningful relief to the Petitioner. Unless rehearing is granted, the Eleventh Circuit will simply rubber stamp a re-instatement, and the Petitioner will have to file a second petition for a writ of certiorari, incurring additional expense, requiring additional judicial labor, and further delaying a final disposition in this case. As noted in the petition for rehearing, moreover, if the Petitioner ultimately prevails on the merits, then he will likely be entitled to immediate release from prison.

II. This Court Should Order the Court of Appeals to Apply the Holding in *Booker* to the Petitioner's Case.

The Petitioner has thoroughly briefed why the Eleventh Circuit's "prudential rule," which conflicts with the rules of all of the other courts of appeals, should be rejected by this Court. In *Levy*, the court of appeals raised a new argument in favor of its rule. Specifically, the court of appeals suggested that this Court has applied this same prudential rule in *Pasquantino v. United States*, 543 U.S.

___, 125 S. Ct. 1766 (2005). (App., *infra*, 7a-8a.) In that case, the petitioner sought to raise a *Booker* argument for the first time in his brief on the merits, even though he did not raise it in his petition for a writ of certiorari or in the court of appeals. *Id.* at ___ n.14, 125 S. Ct. at 1781 n.14. The majority declined to consider the argument in light of the Court's rule that arguments not raised below or in the petition generally are not considered on the merits. *Id.*; *but see id.* at ___ n.5, 125 S. Ct. at 1783 n.5 (Ginsburg, J., dissenting) (arguing that Court should have made an exception to this prudential rule).

The court of appeals concluded, "It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim." (App., *infra*, 8a.) This conclusion is far from "obvious," however, because a court of appeals has a very different role and very different responsibilities than does this Court. In cases reviewed by petition for a writ of certiorari, this Court's jurisdiction is entirely discretionary and is generally exercised based on principles of clarifying important rules of law and resolving conflicts among the lower courts. The courts of appeals, on the other hand, have mandatory jurisdiction and are error-correcting courts.

Moreover, this Court has long rejected the notion that a court of appeals may apply a "prudential rule" to outright refuse to consider an issue that was not raised in the lower court. *See generally United States v. Olano*, 507 U.S. 725 (1993) (courts of appeals must consider merits of issues raised for the first time on appeal, albeit under less stringent plain error standard). There can be no doubt in

this case (and the Government did not dispute in its brief in opposition) that the Petitioner can satisfy the plain error test.

Finally, Judge Tjoflat sets forth additional compelling arguments to reject the Eleventh Circuit's rule, a rule that he describes as "particularly problematic when applied to cases on remand from the Supreme Court." (App., *infra*, 28a.) Indeed, Judge Tjoflat expressly urged this Court to correct this erroneous rule. (App., *infra*, 23a, 28a.)

First, he reiterated that the Eleventh Circuit's rule is not an "ordinary prudential doctrine" and is certainly not a form of "waiver" because the defendants in these cases had no "known right" under *Blakely* at the time they filed their initial briefs, particularly in light of the fact that the Eleventh Circuit had conclusively held that they had no such right. (App., *infra*, 21a-23a.)

Second, he argued that this Court's use of a summary "GVR" order (i.e., an order like the one in this case that summarily grants a writ of certiorari, vacates the court of appeals' decision, and remands for further consideration), though "always ... something of a mystery," requires application of the *Booker* holding in these cases. (App., *infra*, 23a-27a.) He relied in part on the following policies this Court outlined in *Stutson v. United States*, 516 U.S. 193 (1996), regarding GVR orders in criminal cases:

> When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that

> caused no prejudice to the prosecution to preclude a remand . . . "in the interests of justice." And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. . . .
>
> Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience." "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts."

(App., *infra*, 25a (quoting *Stutson*, 516 U.S. at 196-97 (in turn quoting *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981), and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942))).)

Judge Tjoflat rightly concluded that the Eleventh Circuit's rule is not only inconsistent with these policies, but also violates this Court's retroactivity jurisprudence in *Teague v. Lane*, 489 U.S. 288, 310 (1989), and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987):

> The Supreme Court has consistently identified the end of a defendant's direct appeal as the point at which systemic interests in finality surpass the defendant's interest in benefiting from a new rule of constitutional law. By refusing to consider claims such as Vanorden's, we [i.e., the Eleventh Circuit] have said essentially that the Supreme Court struck the wrong balance and that the defendant's opening brief on appeal should be the tipping point. Because our reevaluation is based on nothing more than "convenience" and "dry formalism," it is inconsistent with the important and "familiar aspect[s]" of "our legal traditions" *Stutson* emphasizes.

(App., *infra*, 25a-26a.) Further, Judge Tjoflat noted that by refusing to consider *Booker* issues not raised in the initial brief, the Eleventh Circuit is thwarting another purpose this Court identified in *Stutson* – "to consider . . . arguments that were not previously before [the court of appeals]." (App., *infra*, 27a (quoting *Stutson*, 516 U.S. at 197).)

Thus, this Court should take this opportunity to vindicate the policies it has espoused and reject the Eleventh Circuit's unflinching refusal to apply *Booker* in cases such as this.

III. The Question Presented in This Case Is Not Limited to *Booker* and Does Not Require Any Further Clarification of *Booker*.

The Court recently denied a petition for a writ of certiorari in *Rodriguez v. United States*, Case No. 04-1148 (June 20, 2005), in which both the petitioner and the Solicitor General asked the Court to resolve a substantial split among the circuits regarding how the plain error standard should be applied to *Blakely/Booker* "pipeline cases" (i.e., cases that were pending on direct review at the time of *Blakely* or *Booker*). Commentators have inferred from this denial that the Court may not want to delve back into the issues raised by those recent decisions. *See, e.g.*, Lyle Denniston, *Court turns aside Booker sequel*, SCOTUSblog, *at* http://www.scotusblog.com/movabletype/archives/2005/06/court_returns_t.html (June 20, 2005) ("The Supreme Court [in *Rodriguez*] sent an emphatic signal that it is not yet ready to start sorting out some of the complications of its January 12 decision in *U.S. v. Booker*."); *see generally* Douglas A. Berman, *Pondering the SCOTUS plain error dodge*, Sentencing Law & Policy, *at*

http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/pondering_the_s.html (reviewing reasons the Court might feel that certiorari review is not appropriate at this time) (June 20, 2005).

Any hesitancy by the Court to address *Booker* issues at this time should not deter the Court from resolving the split raised by the Petitioner in this case. Although this case involves a *Booker* claim, the question presented does not require any application, refinement, or further interpretation by this Court of the Sixth Amendment, the Sentencing Guidelines, or the holdings in *Booker* and *Blakely*. Nor will this issue eventually go away when the *Blakely/Booker* pipeline dries up. The issue arises any time the Court announces a new rule of criminal procedure that is applicable to cases pending on direct appeal.

Respectfully submitted,

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July 14, 2005

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-17133

D.C. Docket No. 99-08125-CR-DTKH

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

RAPHAEL R. LEVY

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(July 12, 2005)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before ANDERSON, HULL and PRYOR, Circuit Judges.

PER CURIAM:

This case is before this Court for the third time. We previously affirmed Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and denied Levy's

petition for rehearing in *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004).[1] On June 6, 2005, the Supreme Court vacated our judgment and remanded Levy's case to us for further consideration in light of *United States v. Booker*, 125 S.Ct. 738 (2005). *See Levy v. United States*, ___ S.Ct. ___, 2005 WL 540692 (U.S. June 6, 2005).

Having now considered Levy's case in light of *Booker*, we affirm Levy's sentences not only for the reasons stated in our prior opinions but also for those explained below.

I. BACKGROUND

After this Court affirmed Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), the Supreme Court decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004), which extended the constitutional rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to the Washington State Sentencing Guidelines. As we all are aware, the Supreme Court again extended *Apprendi* to the United States Sentencing Guidelines in *Booker*.

After *Blakely*, but before *Booker*, Levy filed a petition for rehearing in this Court asserting, for the first time, that he had a right to a jury trial regarding his federal sentencing enhancements. In his petition for rehearing, Levy conceded that at no time prior to his petition for rehearing – not in the district court and not in his briefs on appeal – did he raise any argument regarding the constitutionality of the sentencing guidelines or any right

[1] On December 3, 2004, this Court also denied Levy's petition for en banc rehearing. *United States v. Levy*, 391 F.3d 1327 (2004).

to a jury trial on his sentencing enhancements or any arguments grounded in *Apprendi*.

On August 3, 2004, this Court denied Levy's petition for rehearing based on this Court's long-standing prudential rule of declining to entertain issues not raised in an appellant's initial brief on appeal but raised for the first time in a petition for rehearing. *See, e.g., Levy*, 379 F.3d at 1242-45; *United States v. Ardley*, 273 F.3d 991, 991-95 (11th Cir. 2001) (Carnes, J., concurring in the denial of rehearing *en banc*) (collecting cases); *United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000).[2]

Levy then filed a petition for *certiorari* in the Supreme Court. The Supreme Court granted *certiorari*, vacated our judgment, and remanded Levy's case for consideration in light of *Booker*, stating as follows:

> Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005).

Levy v. United States, ___ S.Ct. ___ 2005 WL 540692 (U.S. June 6, 2005). Before considering Levy's case in light of

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[2] Subsequently, this Court has applied this prudential rule in other cases where defendants untimely raised *Blakely*, now *Booker*, claims. *See, e.g., United States v. Pipkins*, ___ F.3d ___ 2005 WL 1421449, at *2 (11th Cir. June 20, 2005); *United States v. Sears*, ___ F.3d ___, 2005 WL 1334892, at *1 (11th Cir. June 8, 2005); *United States v. Verbitskaya*, 406 F.3d 1324, 1339-40 (11th Cir. 2005); *United States v. Day*, 405 F.3d 1293, 1294 n.1 (11th Cir. 2005); *United States v. Dockery*, 401 F.3d 1261, 1262-63 (11th Cir 2005).

Booker, we first explain our prudential rule that issues not raised in a party's initial brief are deemed abandoned and generally will not be considered by this Court. We then consider Levy's case in light of *Booker*, explain why under *Booker* our established prudential rule still applies, and thus why under *Booker* defendant Levy is not entitled to a new sentencing.

II. THIS COURT'S PRUDENTIAL RULE

In *Nealy*, this Court summarized our prudential rule of declining to consider issues not timely raised in a party's initial brief, as follows:

> Parties must submit all issues on appeal in their initial briefs. When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on "*intervening* decisions or *new* developments" regarding issues already properly raised in the initial briefs. Also, parties can seek permission of the court to file supplemental briefs on this new authority. But parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority.

Nealy, 232 F.3d at 830 (internal citations omitted). This Court's prudential rule is well established, and thus we repeatedly have declined to consider issues raised for the first time *in a petition for rehearing. See, e.g., United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996); *Scott v. Singletary*, 38 F.3d 1547, 1552 n.7 (11th Cir. 1994); *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481 (11th Cir. 1989); *Dunkins v. Thigpen*, 854 F.2d 394, 399 n.9 (11th

Cir. 1988); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir. 1985).[3]

To allow a new issue to be raised in a petition for rehearing circumvents Federal Rule of Appellate Procedure 28(a)(5), which requires that an appellant's initial brief must contain "a statement of the issues presented for review."[4] Further, the rule requiring that issues be raised

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[3] In addition, before a decision on the merits of a direct appeal, this Court repeatedly has denied motions to file supplemental briefs that seek to raise new issues not covered in an appellant's initial brief on appeal. *See, e.g., Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000); *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1495-97 (11th Cir. 1990) (en banc); *see also Fed. Sav. And Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987).

As for reply briefs, this Court also declines to consider issues raised for the first time in an appellant's reply brief. *See, e.g., KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1328 n.4 (11th Cir. 2004) (quoting *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987)); *United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996); *Jackson v. United States*, 976 F.2d 679, 680 n.1 (11th Cir. 1992); *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *United States v. Benz*, 740 F.2d 903, 916 (11th Cir. 1984).

[4] In *Nealy*, this Court noted that "[p]arties must submit all issues on appeal in their initial briefs." 232 F.3d at 830 (citing Fed. R. App. P. 28(a)(5)). The *Nealy* Court explained that supplemental briefs will be authorized, pursuant to 11th Cir. R. 28-1, I.O.P.5, only when intervening decisions or new developments arise after the moving party's brief has been filed and only when that new authority relates to an issue or issues already properly raised in the party's initial brief. *Id.* The Court expressly concluded that "parties cannot properly raise new issues at supplemental briefing, even if the [new] issues arise based on the intervening decisions or new developments cited in the supplemental authority." *Id.* The new indictment issue we refused to hear in *Nealy* was *Apprendi*-based. *Id.*

in opening briefs "serves valuable purposes, as do all of the procedural default rules, which is why we regularly apply them. *See generally Presnell v. Kemp*, 835 F.2d 1567, 1573-74 (11th Cir. 1988)." *Ardley*, 273 F.3d at 991 (Carnes, J., concurring in the denial of rehearing *en banc*).[5] Two of those valuable purposes are judicial economy and finality. Indeed, both purposes are implicated in this case as Levy concedes that he did not raise any constitutional challenges to the sentencing guidelines or his sentence or any *Apprendi*-type argument until *after* this Court had already held oral argument and issued a published opinion affirming his sentences.

Accordingly, based on our prudential rule, this Court denied Levy's petition for rehearing, based on his failure to raise any *Apprendi*-type issue in his initial brief on appeal. *Levy*, 379 F.3d at 1245.

III. CONSIDERATION IN LIGHT OF *BOOKER*

Because of the Supreme Court remand, we now further consider Levy's sentences in light of *Booker*. We recognize that in *Booker*, the Supreme Court instructed courts to "apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, 125 S.Ct. at 769. However, the *Booker* Court itself emphasized that even though *Booker* was to be applied to cases on direct review it did not mean "that every sentence gives rise to a Sixth Amendment violation [or] that every appeal

[5] Importantly, this rule applies with equal force, regardless of whether it is the government, criminal defendant, or any other party to litigation who has failed to raise an issue in their opening brief.

will lead to a new sentencing hearing." *Id.* In fact, the Supreme Court in *Booker* also directed courts to "apply ordinary prudential doctrines [including], for example, whether the issue was raised below. . . . " *Id.*

Moreover, this principle recognized in *Booker* – that retroactivity is subject to ordinary prudential doctrines – is also explicitly recognized in two other Supreme Court cases. *See Shea v. Louisiana*, 470 U.S. 51, 58 n.4, 105 S.Ct. 1065, 1069 n.4 (1985); *Pasquantino v. United States*, 125 S.Ct. 1766, 1781 n.14 (2005).

For example, in *Shea v. Louisiana*, the Supreme Court concluded that "if a case was pending on direct review at the time *Edwards* [*v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981)] was decided, the appellate court must give retroactive effect to *Edwards*, subject, of course, to established principles of waiver, harmless error, and the like." *Shea*, 470 U.S. at 58 n.4, 105 S.Ct. at 1069 n.4. According to *Shea*, courts of appeal must subject the retroactive effect of new cases to established prudential rules. *Id.* As noted above, this Court's prudential rule that issues not raised in a party's initial brief will not be considered is certainly well-established. Thus, as dictated in *Shea*, the retroactive effect of *Booker* is subject to our established prudential rules.

Further, in *Pasquantino v. United States*, the Supreme Court applied its own prudential rules to foreclose the ability of defendants to raise untimely *Blakely* claims. In *Pasquantino v. United States*, issued after *Booker*, the petitioners argued "in a footnote that their sentences should be vacated in light of *Blakely*. . . . " *Pasquantino*, 125 S.Ct. at 1781 n.14. However, "Petitioners did not raise this claim before the Court of Appeals or in their petition

for certiorari." *Id.* Although the petitioners failed to previously raise the issue, the dissent emphasized that "[t]his omission was no fault of the defendants, . . . as the petition in this case was filed and granted well before the Court decided *Blakely*. Petitioners thus raised *Blakely* at the earliest possible point: in their merits briefing." *Pasquantino*, 125 S.Ct. at 1783 n.5 (Ginsburg, J., dissenting). Despite the fact that the petitioners raised their *Blakely* claim at the earliest possible moment after that decision was released, the Supreme Court applied its prudential procedural rules and declined to address the issue. *Pasquantino*, 125 S.Ct. at 1781 n.14.

It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim.

We also point out why *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), is fully consistent with our established prudential rule. In *Griffith*, the Supreme Court concluded that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final. . . . " *Id.* at 328, 107 S.Ct. at 716. However, *Griffith* addressed a situation in which the defendant timely raised the error in issue in both *the district court* and *the court of appeals*. As we have stated, "[t]he *Griffith* holding . . . applies only to defendants who preserved their objections throughout the trial and appeals process." *Verbitskaya*, 406 F.3d at 1340

n.18 (citing *Griffith*, 479 U.S. at 316-20, 107 S.Ct. at 709-11).[6]

Thus, there are two distinct and independent rules: (1) retroactivity; and (2) this Court's prudential rule that issues not raised in the opening brief are abandoned. Although each rule plays an equally important role in the orderly administration of justice, they answer different questions. As explained by Judge Carnes in *Ardley*,

> [r]etroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway.

Ardley, 273 F.3d at 992 (Carnes, J., concurring in the denial of rehearing *en banc*).

Requiring all parties to raise issues in their initial briefs is not unduly harsh or overly burdensome. This is particularly true about constitutional challenges to the federal sentencing guidelines, which have continued to be raised for many years despite adverse precedent. Moreover, when *Apprendi* was decided in 2000, criminal

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[6] The *Griffith* Court did not require that a dissimilarly situated defendant – one who did not preserve his objection below or on appeal – would necessarily benefit from the new constitutional rule. Instead, the *Griffith* holding is necessary to "treat[ ] similarly situated defendants the same." *Griffith*, 479 U.S. at 323, 107 S.Ct. at 713. Parties who fail to raise timely claims of error are not similarly situated to those who properly preserved their claims. After all, that is the very basis of plain-error review. Likewise, those parties that timely raise issues in their initial appellate briefs are not similarly situated to those who fail to timely raise issues in their initial appellate brief.

defense attorneys were well aware of *Apprendi*'s potential impact on the sentencing guidelines well before the Supreme Court's decisions in *Blakely* and *Booker*. For example, in numerous cases before our Court, defense counsel, after *Apprendi* and before *Blakely*, asserted that their clients' rights to a jury trial were violated when the district court enhanced their sentences with extra-verdict enhancements not proved to a jury beyond a reasonable doubt. *See, e.g., United States v. Reese*, 382 F.3d 1308, 1309 (11th Cir. 2004), *vacated by* 125 S.Ct. 1089 (2005)[7]; *United States v. Petrie*, 302 F.3d 1280, 1289-90 (11th Cir. 2002), *cert. denied*, 538 U.S. 971, 123 S.Ct. 1775 (2003); *United States v. Snyder*, 291 F.3d 1291, 1294 n.3 (11th Cir. 2002); and *United States v. Rodriguez*, 279 F.3d 947, 949-50, 950 n.2 (11th Cir. 2002). These *Apprendi*-type arguments about federal sentencing enhancements were made in those cases not only before *Blakely* but also despite adverse precedent in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001).

Although it may be true that most attorneys could not have predicted the Supreme Court's precise resolution of the sentencing issues in *Booker*, the general argument that the federal sentencing guidelines are unconstitutional or that a jury, not a judge, must decide the facts supporting extra-verdict sentencing enhancements was available to counsel long before *Blakely* and *Booker*. *See McGinnis*, 918 F.2d at 1496 (stating that although no one could have

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[7] For example, Reese's initial brief was filed on January 20, 2004, before *Blakely* was decided on June 24, 2004. In his initial brief on appeal, Reese made an *Apprendi*-based argument about a sentencing enhancement he received. *Reese*, 382 F.2d 1308, 1310 n.1.

predicted the Supreme Court's resolution of a case resolving the scope of § 1981, the general argument that § 1981 did not apply to appellant's conduct was available, and appellant waived its argument by not raising it in its initial brief).[8]

Moreover, although this Court does not consider *Blakely*, now *Booker*, issues not raised in any way in a party's initial brief, we have liberally construed what it means to raise a *Blakely*-type or *Booker*-type issue. *See United States v. Dowling*, 403 F.3d 1242, 1246 (11th Cir. 2005) (evaluating whether a *Blakely/Booker* claim was made by reviewing whether a defendant: (1) referred to the Sixth Amendment; (2) referred to *Apprendi* or another related case; (3) asserted his right to have the jury decide the disputed fact; *or* (4) raised a challenge to the role of the judge as factfinder with respect to sentencing factors). Levy concedes he made no such claim in any manner until his petition for rehearing. Thus, the application of this Court's prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim does not result in manifest injustice.

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[8] There is a good example of the continued availability of previously foreclosed arguments in the *Apprendi* line of cases. *Compare Walton v. Arizona*, 497 U.S. 639, 649, 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511 (1990), with *Ring v. Arizona*, 536 U.S. 584, 588-89, 595, 122 S.Ct. 2428, 2432, 2436 (2002) (overruling *Walton*). The defendant in *Ring* preserved his argument about Arizona's capital sentencing scheme even though that argument appeared foreclosed by *Walton*.

IV. THE AFFECT OF SUPREME COURT REMANDS ON THE APPLICATION OF THIS COURT'S PRUDENTIAL RULES

Finally, we discuss the specific remand order in Levy's case. Since *Booker*, the Supreme Court has remanded over a hundred of our Circuit's cases with this standard order or something similar: "The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005)." As noted above, this same order was used in Levy's remand. Obviously, some of these remands, including *Levy*, involved cases in which this Court applied its prudential rules and refused to consider defendant's belated efforts to raise *Blakely/Booker* claims. *See, e.g., Levy v. United States*, ___ S.Ct. ___, 2005 WL 540692 (U.S. June 6, 2005) (No. 04-8942); *Sears v. United States*, 125 S.Ct. 1348 (2005); *Dockery v. United States*, 125 S.Ct. 1101 (2005).[9] As noted above, *Booker* itself recognized that retroactivity is subject to ordinary prudential rules, and thus nothing in *Booker* undermines or affects our prudential rules; if anything, *Booker* contemplates that they should be applied in *Booker*-remand cases.

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[9] In other cases where a defendant timely raised a Sixth Amendment or *Apprendi* or *Blakely* issue in the opening brief, as many defendants did prior to *Booker*, this Court has considered the merits of those claims. *See, e.g., United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005); *United States v. Martinez*, 407 F.3d 1170 (11th Cir. 2005); *United States v. Orduno-Mireles*, 405 F.3d 960 (11th Cir. 2005); *United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. 2005), *opinion vacated and superceded by* ___F.3d ___, 2005 WL 1297236 (11th Cir. June 2, 2005); *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).

Further, in a concurring opinion in *Ardley*, Judge Carnes explained another reason why this type of general remand does not necessarily impinge on this Court's application of its prudential rules, as follows:

> Whenever the Supreme Court decides an important issue of law, it routinely takes every case in which the court of appeals decision came out before the new decision was announced and in which the certiorari petitioner claims that new decision might apply, and treats all of those cases the same. The uniform treatment given all such cases is to vacate the court of appeals judgment and remand the case for further consideration in light of the new decision. Those boilerplate orders come out in bushel baskets full. There is no implication in the standard language of those orders that the court of appeals is to do anything except reconsider the case now that there is a new Supreme Court decision that may, or may not, affect the result. We have never felt constrained to read anything into such routine remands other than the direction that we take another look at the case because of the new decision.

Ardley, 273 F.3d at 994 (Carnes, J., concurring in the denial of rehearing *en banc*). As this Court has now consistently concluded, the Supreme Court's general remand in these types of cases does not mandate any particular outcome as to the defendant's sentence, nor do they preclude this Court from applying its prudential rules in a uniform and consistent manner. *See Pipkins*, 2005 WL 1421449, at *2; *Sears*, 2005 WL 1334892, at *1; *Dockery*, 401 F.3d at 1262-63; *Ardley*, 273 F.3d at 995 (Carnes, J., concurring in the denial of rehearing *en banc*).

Instead, what is required is that we take another look at this case and consider it in light of *Booker*. We have done so, and, consistent with *Booker* and our case law, we affirm Levy's sentences for the reasons outlined herein and in our prior opinions. We also reinstate our prior panel opinion affirming Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and, to the extent necessary, our opinion denying Levy's petition for rehearing by the panel in *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004).

AFFIRMED and PRIOR OPINIONS REINSTATED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11083

D.C. Docket No. 02-14049-CR-DLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN HOWARD VANORDEN, JR.,
a.k.a. "Robotruc@Bellsouth.net",

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 2005)

**ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES**

Before TJOFLAT and MARCUS, Circuit Judges, and MUSGRAVE*, Judge.

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* Honorable Kenton R. Musgrave, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

On November 4, 2002, John Howard Vanorden, Jr. pled guilty to one count of receiving a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). The base offense level for this offense was seventeen. *U.S. Sentencing Guidelines Manual* § 2G2.2(a) (2002). The district court added two levels because the material involved depicted children under the age of twelve, *id.* § 2G2.2(b)(1), five levels because the offense involved "[d]istribution for the receipt, or expectation of receipt, a thing of value, but not for pecuniary gain," *id.* § 2G2.2(b)(2)(B), four levels because the offense involved masochistic conduct, *id.* § 2G2.2(b)(3), and two levels because the offense involved a computer, *id.* § 2G2.2(b)(5). The court subtracted three levels based on Vanorden's acceptance of responsibility. *Id.* § 3E1.1. These adjustments resulted in a total offense level of twenty-seven, which yielded a guideline sentencing range of 70-87 months imprisonment when coupled with Vanorden's criminal history category of I. On appeal, Vanorden raised only one issue: whether the district court had erred in enhancing his sentence under § 2G2.2(b)(2)(B), *supra*, because that guideline did not apply to his conduct. He did not raise a constitutional challenge to his sentence based on the Sixth Amendment right to a trial by jury, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), or *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).[1] We

[1] This omission is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in

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rejected Vanorden's lone claim and affirmed his sentence in an unpublished opinion. *United States v. Vanorden*, 99 Fed. Appx. 875 (11th Cir. Apr. 2, 2004).

Vanorden thereafter filed a petition for a writ of certiorari. On January 24, 2005, the Supreme Court granted Vanorden's petition, vacated our decision, and remanded the case "for further consideration in light of [*Booker*]." *Vanorden v. United States*, 543 U.S. ___, 125 S. Ct. 1040, 160 L. Ed. 2d 1026 (2005). Under our recent decision in *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), however, "further consideration in light of *Booker*" does not actually require any consideration of the merits of Vanorden's *Booker* claim:

> Nothing in the [*Booker*] opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us. Nor is there anything in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the [*Booker*] issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Id. at 1262-63 (quoting *United States v. Ardley*, 242 F.3d 989, 990, *reh'g en banc denied*, 273 F.3d 991 (11th Cir.

Apprendi, "ha[d] no application to, or effect on, . . . Sentencing Guidelines calculations, when . . . the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty," *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir. 2001) (en banc).

2001)). Because Vanorden did not challenge his sentence on Sixth Amendment-*Apprendi-Blakely-Booker* grounds in his first trip through this circuit, this argument is "deemed abandoned." Accordingly, we reinstate our previous opinion and AFFIRM Vanorden's sentence.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the judgment of the panel because we are bound by *Dockery*. *See, e.g.*, *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986) ("Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision."). If we were writing on a clean slate, I would consider the merits of Vanorden's *Booker* claim. As the panel notes, *Dockery* concludes that nothing in either *Booker* itself or in the standard Supreme Court order remanding a case "for further consideration in light of [*Booker*]" "requires or suggests that we are obligated to consider" a *Booker* claim that was not raised in the defendant's initial brief on appeal. Under *Dockery*, such a claim is "deemed abandoned" even if the defendant's initial brief was filed before *Blakely* and *Booker* were decided, at which time this and every other circuit had squarely rejected identical arguments. *Dockery*, 401 F.3d at 1262-63 (quoting *Ardley*, 242 F.3d at 990).

This is a strange rule we have: in a case in which the Supreme Court has vacated our decision "for further consideration in light of [*Booker*]" precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we decline to actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme

Court precedent and the law of every other circuit, but also encourages defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable. *See United States v. Levy*, 391 F.3d 1327, 1335-51 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc); *Ardley*, 273 F.3d at 995-1007 (Tjoflat, J., dissenting from the denial of rehearing en banc). Nonetheless, it is a strange, bad rule that is the law of the circuit, so I concur rather than dissent. I write separately to explain briefly (1) why it is particularly troubling that this court continues to refuse to address *Booker* claims in "GVR" cases (*i.e.*, cases in which the Supreme Court has granted the defendant's petition for certiorari, vacated the prior judgment of this court, and remanded for further consideration in light of *Booker*) and (2) the practical consequences of our rule.

To begin with, I cannot agree with *Dockery*'s determination that "[n]othing in the [*Booker*] opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us." *Dockery*, 401 F.3d at 1262 (quoting *Ardley*, 242 F.3d at 990). In *Booker*, the Supreme Court clearly instructed that "we *must* apply [*Booker*'s] holdings – both the Sixth Amendment holding and [its] remedial interpretation of the Sentencing Act – to *all* cases on direct review." *Booker*, 543 U.S. at ___, 125 S. Ct. at 769 (emphasis added). In other words, *Dockery* finds nothing in the Supreme Court's specific directive that we *must* apply *Booker* to *all* cases on direct review that even *suggests* that we should address *Booker* claims in this subset of cases on direct review (*i.e.*, cases in which the defendant's initial brief did not contain a *Booker*-type claim for the imminently sensible reason

that such a claim had been rejected by each and every circuit). Other circuits have, to say the least, read *Booker*'s instruction differently. *E.g.*, *United States v. Ameline*, ___ F.3d ___, 2005 WL 1291977, at *11 (9th Cir. June 1, 2005) (en banc) ("*Booker* explicitly stated that its holding applies to all cases pending on direct appeal. *Booker*, 125 S. Ct. at 769. Even where the briefs filed by the parties do not raise a *Booker* objection, we conclude that the issue may be raised and should be considered."); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" (citation omitted) (quoting *Booker*, 543 U.S. at ___, 125 S. Ct. at 769)).

To be sure, the *Booker* Court did go on to say that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." 543 U.S. at ___, 125 S. Ct. at 769. And the Supreme Court has also said that the general principle that a decision concerning the conduct of criminal prosecutions must be applied to all cases still pending on direct review is "subject, of course, to established principles of waiver, harmless error, and the like." *Shea v. Louisiana*, 470 U.S. 51, 58 n.4, 105 S. Ct. 1065, 1069 n.4, 84 L. Ed. 2d 38 (1985).[1] These qualifications of the general principle do

[1] *Shea* was decided two years before *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), which was the first Supreme Court case to hold that, without exception, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

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not, however, implicate this case. First, the rule followed in *Dockery* is not an "ordinary prudential doctrine"; in fact, it is a quite *extra*ordinary rule in that we invented it only four years ago and it has not been followed by any other circuit. *See Levy*, 391 F.3d at 1343-48 (Tjoflat, J., dissenting from the denial of rehearing en banc). Second, the fact that Vanorden's claim is "subject . . . to established principles of waiver" is inapposite because Vanorden has done nothing that can plausibly be construed as a "waiver." As the Supreme Court has explained, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). Thus, while Vanorden did forfeit his *Booker* claim by failing to "timely assert[]" it – which means that review in his case should be for plain error only – it is clear that he has not "waived" it. At the time the supposed waiver took place – when Vanorden's lawyer filed his initial brief in April 2003 – *Blakely* and *Booker* had not yet been decided,[2] and this circuit and every other had squarely rejected *Blakely/Booker*-type arguments. It, therefore,

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cases, state or federal, pending on direct review or not yet final." *Id.* at 328, 107 U.S. at 716.

[2] Vanorden's opening brief was filed on April 17, 2003, about three weeks before a petition for certiorari was filed in *Blakely*, *see* Petition for a Writ of Certiorari, *Blakely* (No. 02-1632), and about six months before the court granted the petition, *Blakely v. Washington*, 540 U.S. 965, 124 S. Ct. 429, 157 L. Ed. 2d 309 (2003).

makes no sense to say that Vanorden "intentional[ly] relinquish[ed]" a "known" Sixth Amendment right.[3] In

[3] Several other circuits have expressly agreed that such an omission is not a "waiver." *E.g.*, *United States v. Vazquez-Rivera*, 407 F.3d 476, 487-88 (1st Cir. 2005); *United States v. Macedo*, 406 F.3d 778, 789 (7th Cir. 2005); *United States v. McDaniel*, 398 F.3d 540, 546-47 (6th Cir. 2005).

In my dissent in *Levy*, I tried to explain the difference between "waiver" and "forfeiture" and its significance in this context: a new constitutional rule concerning criminal prosecutions applies to *all* cases then pending on direct review unless the defendant has waived (and not just forfeited) the claim, *see supra* note 1 and accompanying text; and, moreover, Federal Rule of Criminal Procedure 52(b) extends plain-error review to all issues unless they have been waived (and not just forfeited) by the defendant, *see Olano*, 507 U.S. at 732-34, 113 S. Ct. at 1777. The waiver/forfeiture distinction is thus crucial. *See generally Levy*, 391 F.3d at 1339 n. 7, 1341-43 (Tjoflat, J., dissenting from the denial of rehearing en banc). My discussion of this point drew the following response from the concurrence:

> The dissent . . . attempts to make a distinction between waiver, forfeiture, and abandonment. However, the dissent misunderstands the issue. The issue is not whether Levy's failure to raise his *Blakely*-type issue necessarily constitutes waiver, forfeiture, or abandonment. Rather, the issue is whether this Court will apply its well-established procedural rules; that is, this Court will not consider claims raised in a petition for rehearing that were never raised, in any form, in a defendant's initial brief on direct appeal.
>
> The dissent attempts to confuse the issue by discussing the difference between waiver, forfeiture, and abandonment. The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does. Rather, this Court, out of concerns for judicial economy and finality, has elected to adopt and apply procedural rules universally and equally. This is not only fair and consistent, but a logical extension of the Supreme Court's decision in *Shea*.

Id. at 1334-35 (Hull, J., concurring in the denial of rehearing en banc).

My discussion was not intended to "confuse" anyone. I understand, of course, that the issues-not-briefed-are-waived rule does not turn on

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sum, because the rule that bars Vanorden's *Booker* claim is not an "ordinary prudential doctrine," and because Vanorden has done nothing to "waive" his claim, *Booker* does, in fact, obligate us to consider it. *Dockery*'s conclusion to the contrary is erroneous and should be corrected by this court sitting en banc or by the Supreme Court.

I also cannot agree with the conclusion reached in *Dockery* that nothing in the Supreme Court's standard GVR order requires us to consider claims such as Vanorden's. The precise significance of these orders has always been something of a mystery,[4] but the Supreme Court's

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the waiver/forfeiture distinction; rather, its application turns simply on whether the issue was in the brief. The point I was endeavoring to make is that because *Griffith*, *Shea*, and *Olano* do turn on this distinction, we cannot go merrily along "adopt[ing] and apply[ing] procedural rules" in a way that conflicts with those decisions. In the end, the essence of the concurrence's position was that our rule (a) does not require a knowing and intelligent waiver and (b) is "but a logical extension of the Supreme Court's decision in *Shea*." To its credit, the concurrence did concede that its position was an "extension" of Supreme Court precedent. But the problem remains that this extension is neither "logical" nor justifiable because "[w]aiver is different from forfeiture," *Olano*, 507 U.S. at 733, 113 S. Ct. at 1773; contrary to the concurrence's position, the terms are not freely interchangeable.

[4] *See generally* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1983); *see also Henry v. City of Rock Hill*, 376 U.S. 776, 776-77, 84 S. Ct. 1042, 1043, 12 L. Ed. 2d 79 (1964) (stating that a GVR is appropriate when the Court is "not certain that the case was free from all obstacles to reversal on an intervening precedent" but the intervening decision is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case"); Robert L. Stern et al., *Supreme Court Practice* 319 (8th ed. 2002) (stating that when the Supreme Court issues a GVR, "the lower court is being told simply to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result").

discussion of its GVR power in *Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996), nonetheless implies that we should not disregard claims like the one presented here. In *Stutson*, after the defendant was convicted of cocaine possession and sentenced to 292 months in prison, his attorney filed his notice of appeal in the district court, rather than in the court of appeals (as required by Federal Rule of Appellate Procedure 4(b)), and one day late. The district court held that this mistake barred any appeal because it did not constitute "excusable neglect" under Rule 4(b). Shortly before the district court's decision, the Supreme Court had held that comparable attorney negligence could establish "excusable neglect" under the bankruptcy rules; however, that opinion was not cited in the briefs to the district court or in the district court's decision. On appeal in this court, the parties disputed the applicability of the bankruptcy decision in the criminal context. We affirmed without oral argument or written opinion. By the time the case reached the Supreme Court, however, all six circuits to address the issue had held that the "excusable neglect" standard articulated in the bankruptcy case also applied in the criminal context, and the Government had even changed its position to agree with those circuits. *See id.* at 194-95, 116 S. Ct. at 601-02. The Court concluded that "this exceptional combination of circumstances present[ed] ample justification for a GVR order" – even though the GVR was "for further consideration in light of" an opinion that was addressed in the briefs filed below, and even though the Government had not confessed error, but merely disavowed its previous litigating position. *Id.* at 195-96, 116 S. Ct. at 602.

Stutson's holding concerning the scope of the Supreme Court's GVR power is, of course, not relevant here. But some of its discussion of the purpose of those orders is instructive. The Court first emphasized,

> [I]t is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that caused no prejudice to the prosecution to preclude a remand . . . "in the interests of justice." And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. . . .
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> Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience." "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts."

Id. at 196-97, 116 S. Ct. at 603 (citations omitted) (quoting *Wood v. Georgia*, 450 U.S. 261, 265, n.5, 101 S. Ct. 1097, 1100, n.5, 67 L. Ed. 2d 220 (1981), and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274, 63 S. Ct. 236, 239, 87 L. Ed. 268 (1942)). These concerns apply with equal force here. In view of the fact that Vanorden is "subject to the continuing coercive power of the Government in the form of imprisonment," it is not too much to ask that we make the minor "procedural accommodations" necessary to determine whether any portion of his sentence of imprisonment violates the Constitution. The Supreme Court has consistently identified the end of a

defendant's direct appeal as the point at which systemic interests in finality surpass the defendant's interest in benefitting from a new rule of constitutional law.[5] By refusing to consider claims such as Vanorden's, we have said essentially that the Supreme Court struck the wrong balance and that the defendant's opening brief on appeal should be the tipping point. Because our reevaluation is based on nothing more than "convenience" and "dry formalism," it is inconsistent with the important and "familiar aspect[s]" of "our legal traditions" *Stutson* emphasizes.

The *Stutson* Court also explained some of the reasons for the GVR order it issued: "a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations" and also "promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson*, 516 U.S. at 197, 116 S. Ct. at 603. Three aspects of this description of the GVR order are instructive here: First, to "guarantee [] . . . full and fair consideration" of all of a person's "rights" implies more than to permit review of those issues that were previously raised in the court of appeals. Second, a GVR order does not "promote[] fairness" if the court of appeals refuses to give the case

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[5] *E.g.*, *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); *Griffith*, 479 U.S. at 328, 107 S. Ct. at 716 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

"further consideration in light of" the very decision that triggered the GVR, as the defendant is then no better off than he was before the GVR. Third, if one purpose of a GVR order is for the court of appeals "to consider . . . arguments that were not previously before it," then we thwart that purpose by failing to consider *Booker* issues in cases like this one. Thus, although *Stutson* is not clearly controlling, its rationale does suggest that GVR orders are more significant than this court has been willing to admit.

Lastly, it must be clear that our *Ardley-Levy*[6]*-Dockery* line of cases is especially pernicious because it constitutes an absolute, across-the-board bar to claims such as the one we refuse to consider here. These claims are now barred on both direct appeal and collateral review, and they also cannot form the basis of an ineffective assistance of counsel claim, *see Levy*, 391 F.3d at 1334 n.3 (Hull, J., concurring in the denial of rehearing en banc); *Ardley*, 273 F.3d at 993-94 (Carnes, J., concurring in the denial of rehearing en banc).[7] The upshot of our rule, therefore, is

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[6] The Supreme Court has vacated the judgment in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and remanded for further consideration in light of *Booker*. *United States v. Levy*, 543 U.S. ___, ___ S. Ct. ___, 2005 WL 540692 (June 6, 2005) (No. 04-8942).

[7] If on direct review, an appellate court improperly refuses to apply *Booker* retroactively, "then a court conducting collateral review of such a conviction should rectify the error and apply [*Booker*] retroactively." *Shea*, 470 U.S. at 58 n.4, 105 S. Ct. at 1069 n.4. Thus, on collateral review, a defendant such as Vanorden will have a substantial argument that *Booker* should apply retroactively. I have no doubt that most such defendants will make this argument, that the district courts in this circuit will have to adjudicate their claims, and that we will at least have to deal with them in the form of applications for certificates of appealability. The same is true with respect to ineffective assistance claims based on counsel's failure to raise a *Booker*-type claim in the defendant's opening brief. Although these claims are unlikely to

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that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review, *e.g.*, *Booker*, 543 U.S. at ___, 125 S. Ct. at 769; *Griffith*, 479 U.S. at 328, 107 S. Ct. at 716, will not apply at all to cases on direct review like this one.[8]

I continue to disagree with the rule we apply in this case for all the reasons given in my dissents in *Levy* and *Ardley*. As explained here, this rule is particularly problematic when applied to cases on remand from the Supreme Court. Hopefully, this court sitting en banc, or the Supreme Court, will soon correct this practice. However,

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succeed, they will surely be litigated, particularly given that we have characterized counsel's omission as a "waiver" of the possibility of a substantially lower sentence. Thus, I am not saying that these claims will not be raised on collateral review; rather, I am simply observing here that it is all but certain that they will fail because (1) the district court and this court on appeal will be bound to conclude that the refusal to apply *Booker* on direct appeal was entirely proper, and (2) six of the twelve judges on this court joined an opinion concurring in the denial of rehearing en banc in either *Ardley* or *Levy* that stated that this sort of "waiver" will not constitute ineffective assistance of counsel.

[8] In contrast, in *Stutson*, *supra*, it was at least clear that the defendant was left with an ineffective assistance claim even if the Supreme Court did not GVR his direct appeal. *See generally Roe v. Flores-Ortega*, 528 U.S. 470, 480, 484, 120 S. Ct. 1029, 1036, 1038, 145 L. Ed. 2d 985 (2000) (holding that counsel's failure to file a timely notice of appeal without first consulting the defendant constitutes ineffective assistance if (1) "there is reason to think . . . that a rational defendant would want to appeal" or the defendant himself "reasonably demonstrated to counsel that he was interested in appealing" and (2) there is a reasonable probability that the defendant would have appealed but for counsel's failure to consult him). Nonetheless, the Supreme Court emphasized that "convenience" and "formalism" should not stand in the way of considering his claim on direct appeal.

because a panel of this court is not free to do so, I concur in the judgment.